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December 20, 2018

VIA ECF

Hon. Dora L. Irizarry
United States District Judge
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***Weiss, et al. v. National Westminster Bank Plc*, 05-cv-4622**
***Applebaum, et al. v. National Westminster Bank Plc*, 07-cv-916**
***Strauss, et al. v. Crédit Lyonnais, S.A.*, 06-cv-702**
***Wolf, et al. v. Crédit Lyonnais, S.A.*, 07-cv-914**

Dear Chief Judge Irizarry:

Plaintiffs write in response to Defendants' December 17, 2018 letter regarding the recent Seventh Circuit decision in *Kemper v. Deutsche Bank AG*, No. 18-1031 (7th Cir. Dec. 12, 2018). Defendants maintain that this nonbinding authority compels this Court to decide, *as a matter of law and contrary to clear Second Circuit precedent*, that Defendants' knowing provision of material support to Hamas institutions that are part of a designated Foreign Terrorist Organization *cannot* meet the "act of international terrorism" requirement of the Anti-Terrorism Act, 18 U.S.C. § 2331(1) (the "ATA").[1] Defendants' interpretation is inconsistent with the Second Circuit's decision in *Linde v. Arab Bank PLC*, 882 F.3d 314 (2d Cir. 2018), and the holding of *Kemper* itself.

As this Court is aware, the *Linde* panel "conclude[d] only that providing routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to excuse the charging error here *and compel a finding that as a matter of law*" the services constituted an act of international terrorism. *Linde*, 882 F.3d at 327 (emphasis added). The Second Circuit held that determining whether knowingly providing financial services to a terrorist organization constitutes an act of international terrorism — or whether knowingly providing financial services to Hamas can ever be considered "routine" — "raises questions of fact

[1] This element is not required for Plaintiffs' claims under 18 U.S.C. § 2333(d), which arise from the Justice Against State Sponsors of Terrorism Act that was enacted in 2016.

for a jury to decide." *Id.* Notwithstanding this plain and controlling language, Defendants ask this Court to discard *Linde* for an out-of-circuit opinion.

Defendants' attempt to undo the objective standard for "apparent terroristic intent" must also fail, for the same reasons. The case law is well-settled that, in determining whether an ATA defendant acted with the requisite "apparent terroristic intent," the fact-finder must apply an objective standard. *See*, *e.g.*, *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 693-94 (7th Cir. 2008) (*en banc*) ("*Boim III*"); *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 (2d Cir. 2014); *Linde*, 882 F.3d at 327.

Finally, the *Kemper* panel tried to distinguish *Boim III* by emphasizing that it "dealt with direct donations to a known terrorist organization. While giving fungible dollars to a terrorist organization may be 'dangerous to human life,' doing business with companies and countries that have significant legitimate operations is not necessarily so." Slip op. at *10. *Kemper* is irreconcilable with *Weiss* (and the ATA's text), in which this Circuit found that if the defendants' customers solicited funds for Hamas, those customers engaged in "terrorist activities, . . . *regardless of whether those funds were used for terrorist or non-terrorist activities*." 768 F.3d at 209 (emphasis added). *See also id.* ("if Interpal solicited funds for Hamas, then Interpal engaged in terrorist activity . . . ."). Terrorist activities are inherently violent or dangerous to human life, and *Weiss* dictates that knowingly facilitating the funding provided by Interpal or CBSP to Hamas "involves" the same danger (the *Kemper* panel evidently read the word "*involves*" out of the statute). Finally, of course, there is no requirement at either the pleading or summary judgment stage of litigation that plaintiffs prove that providing support is "*necessarily*" dangerous. Slip op. at *10.

Although the *Kemper* decision conflicts with the law of this and other circuits, even the *Kemper* panel noted that the provision of material support directly to Hamas is within "the purview of *Boim III*." More importantly, the allegations here satisfy the requirements established by this Circuit's holdings in *Weiss* and *Linde*. Accordingly, for these reasons and for the reasons set forth in Plaintiffs' prior submissions, Defendants' third motion for summary judgment should be denied.

Respectfully submitted,

/s/ Gary M. Osen

cc: All Counsel via ECF